Supreme Court, U.S.
FILED
JUN 11 2015
OFFICE OF THE CLERK

No. 14-1143

In the Supreme Court of the United States

CHADRIN LEE MULLENIX,
IN HIS INDIVIDUAL CAPACITY, PETITIONER

v.

BEATRICE LUNA, INDIVIDUALLY AND AS
REPRESENTATIVE OF THE ESTATE OF ISRAEL LEIJA, JR.;
CHRISTINA MARIE FLORES, AS NEXT FRIEND OF
J.L. AND J.L., MINOR CHILDREN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

KEN PAXTON
Attorney General of Texas

CHARLES E. ROY
First Assistant Attorney General

KAREN D. MATLOCK
Division Chief,
Law Enforcement Defense

SCOTT A. KELLER
Solicitor General
Counsel of Record

MATTHEW H. FREDERICK
Deputy Solicitor General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
scott.keller@texasattorneygeneral.gov
(512) 936-1700

TABLE OF CONTENTS

Page

Table of Authorities ii

Reply Brief for the Petitioner 1

I. The Court Of Appeals' Erroneous Fourth Amendment Holding Creates A Circuit Split. 2

II. The Court Of Appeals' Holding On Clearly Established Law Should Be Reversed 8

III. This Is An Ideal Vehicle. 10

Conclusion 12

TABLE OF AUTHORITIES

Page

Cases

Ashcroft v. al-Kidd,
131 S. Ct. 2074 (2011) 6, 9

Carroll v. Carman,
135 S. Ct. 348 (2014) (per curiam) 8

Cass v. City of Dayton,
770 F.3d 368 (6th Cir. 2014) 3

City & Cnty. of San Francisco v. Sheehan,
135 S. Ct. 1765 (2015) 7, 8, 9, 10

Cordova v. Aragon,
569 F.3d 1183 (10th Cir. 2009) 9

Cowan v. Breen,
352 F.3d 756 (2d Cir. 2003) 3

Davenport v. Causey,
521 F.3d 544 (6th Cir. 2008) 5

Gonzalez v. City of Anaheim,
747 F.3d 789 (9th Cir. 2014) (en banc) 3

Graham v. Connor,
490 U.S. 386 (1989) 5

Loch v. City of Litchfield,
689 F.3d 961 (8th Cir. 2012) 3

Long v. Slaton,
508 F.3d 576 (11th Cir. 2007) 3, 5

McGrath v. Tavares,
757 F.3d 20 (1st Cir. 2014) 3

O'Bert v. Vargo,
331 F.3d 29 (2d Cir. 2003) 10

Plakas v. Drinski,
19 F.3d 1143 (7th Cir. 1994) 5

Plumhoff v. Rickard,
134 S. Ct. 2012 (2014) 2, 8

Reichle v. Howards,
132 S. Ct. 2088 (2012) 9, 10

Scott v. Harris,
550 U.S. 372 (2007) 5, 8

Stanton v. Sims,
134 S. Ct. 3 (2013) (per curiam) 8

Taylor v. Barkes,
No. 14-939, 2015 WL 2464055
(U.S. June 1, 2015) (per curiam), ... 9, 10

Tennessee v. Garner,
471 U.S. 1 (1985) 2

Vaughan v. Cox,
343 F.3d 1323 (11th Cir. 2003) 3

Waterman v. Batton,
393 F.3d 471 (4th Cir. 2005) 3

Wood v. Moss,
134 S. Ct. 2056 (2014) 8

Other Authorities

Rebecca Elliott & Dale Lezon,
HPD officer killed placing spike strips during police chase, Hous. Chron., May 18, 2015, http://www.houstonchronicle.com/news/houston-texas/houston/article/HPD-officer-killed-placing-spike-strips-during-6271846.php 4

In the Supreme Court of the United States

No. 14-1143

CHADRIN LEE MULLENIX,
IN HIS INDIVIDUAL CAPACITY, PETITIONER

v.

BEATRICE LUNA, INDIVIDUALLY AND AS
REPRESENTATIVE OF THE ESTATE OF ISRAEL LEIJA, JR.;
CHRISTINA MARIE FLORES, AS NEXT FRIEND OF J.L.
AND J.L., MINOR CHILDREN

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

The Fifth Circuit's opinion creates two separate circuit splits and contravenes this Court's recent decisions on qualified immunity. Respondents' arguments ignore an undisputed, crucial fact: the suspect called police dispatch stating that he had a gun and threatening—twice—to shoot police officers. Because this fact is undisputed, this case is an ideal vehicle for providing guidance on when the Fourth Amendment allows police to use deadly force during high-speed car chases where the suspect threatens to shoot police. At a minimum, no clearly established law prohibited Officer Mullenix from using deadly force to prevent the

suspect from carrying out his threat to shoot fellow officers.

The Court has summarily reversed multiple decisions denying qualified immunity on the basis that no clearly established law existed. This case, too, warrants the Court's review, as the Fifth Circuit's unprecedented limitation on the use of force will prevent police from protecting the public.

I. THE COURT OF APPEALS' ERRONEOUS FOURTH AMENDMENT HOLDING CREATES A CIRCUIT SPLIT.

A. Respondents try to evade the circuit split on the Fourth Amendment question (Pet. 29–33) and the conflict with *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014) (Pet. 14–17), by pretending that the suspect Leija was not an imminent threat. But Respondents ignore two important facts: Leija threatened to shoot police officers, and operating tire spikes puts police in harm's way.

1. Ignoring Leija's affirmative threat to shoot police officers, Respondents claim that "Leija did not, at the moment of the shooting, 'pose[] a threat of serious physical harm, either to the officer or to others.'" Br. in Opp. 15 (quoting *Tennessee v. Garner*, 471 U.S. 1, 11 (1985)). But it is undisputed that Leija threatened to shoot police and was driving at high speeds as police pursued him. Pet. App. 26a–27a. The fact that Leija threatened to shoot police, alone, would give any reasonable officer in Mullenix's position probable cause to believe that Leija posed a risk of serious harm

to Officer Ducheneaux as well as other officers and citizens down the road.

Respondents try to remove this fact from the analysis—like the court of appeals—by characterizing Leija as "allegedly . armed and in a car fleeing." Br. in Opp. 12. Leija was not just allegedly armed; he affirmatively called police dispatch, twice threatening to shoot police officers.

Consequently, the cases forming the basis of the circuit split—*McGrath v. Tavares*, 757 F.3d 20 (1st Cir. 2014), *Cass v. City of Dayton*, 770 F.3d 368 (6th Cir. 2014), *Loch v. City of Litchfield*, 689 F.3d 961 (8th Cir. 2012), and *Long v. Slaton*, 508 F.3d 576 (11th Cir. 2007)—cannot be distinguished on the ground that they involved "imminent threats not present here." Br. in Opp. 21. Leija did present an imminent threat: it is undisputed that he threatened to shoot police in the midst of a high-speed car chase. It follows from the reasoning of each of these cases that Officer Mullenix's action was objectively reasonable, and this case would have been decided differently in those circuits.

Likewise, Respondents cannot avoid this circuit split by citing cases in which the threat had clearly passed at the time of shooting, *see Waterman v. Batton*, 393 F.3d 471, 482 (4th Cir. 2005), or cases involving genuine disputes about the underlying material facts, *see Gonzalez v. City of Anaheim*, 747 F.3d 789 (9th Cir. 2014) (en banc); *Cowan v. Breen*, 352 F.3d 756 (2d Cir. 2003); *Vaughan v. Cox*, 343 F.3d 1323 (11th Cir. 2003). *See* Br. in Opp. 18–20.

2. Having ignored Leija's threats, Respondents also disregard the serious risk of harm to officers setting out tire spikes. As amici explain, tire spikes are neither foolproof nor safe. Even if fleeing suspects do not simply drive around the spikes—which they often do—they may continue to drive for long periods on damaged tires, increasing the risk of harm to other vehicles. Br. of Amici Curiae Nat'l Ass'n of Police Orgs. & Nat'l Sheriffs' Ass'n 16. Worse yet, officers using tire spikes are routinely injured or killed, sometimes intentionally by fleeing suspects. *Id.* at 3–4, 15–16. For example, less than one month ago, a Houston police officer died while setting out spike strips when the fleeing suspect swerved to hit him.[1]

Unable to deny that operating tire spikes puts officers at risk, Respondents attempt to discount the risk to Officer Ducheneaux by speculating that he *must* have been safe because he was trained to take cover. Br. in Opp. 11. The Fourth Amendment did not require Mullenix to engage in similar speculation. Nor could a jury find that the threat to Ducheneaux was "too attenuated 'to justify deadly force,'" *id.*, even if the speculated facts were proven. First, that information could not factor into the analysis because it was not available to Mullenix, who was on the over-

---

[1] *See* Rebecca Elliott & Dale Lezon, *HPD officer killed placing spike strips during police chase*, Hous. Chron., May 18, 2015, http://www.houstonchronicle.com/news/houston-texas/houston/article/HPD-officer-killed-placing-spike-strips-during-6271846.php.

pass above Ducheneaux. Whether Mullenix acted unreasonably must be determined based on his perspective, not "the 20/20 vision of hindsight." *Graham v. Connor*, 490 U.S. 386, 396 (1989). Second, a jury would not decide whether Mullenix's use of force was "justified," in any event. The question is whether he acted *reasonably* under the circumstances; that is "a pure question of law." *Scott v. Harris*, 550 U.S. 372, 381 n.8 (2007).

Perhaps because it misperceived the relative costs and benefits of tire spikes, the court of appeals created a circuit split by holding, in effect, that officers may not use potentially deadly force until alternative means have been exhausted. Respondents deny any such holding. Br. in Opp. 12. But if the court of appeals' decision were allowed to stand, no reasonable officer would attempt to stop a fleeing suspect when tire spikes might be in place. By imposing a duty to stand down until alternatives have been exhausted, the court of appeals parted ways with other circuits. *See* Pet. 29–33; *see, e.g.*, *Davenport v. Causey*, 521 F.3d 544, 552 (6th Cir. 2008) ("[T]he Fourth Amendment does not require officers to use the best technique available as long as their method is reasonable under the circumstances."); *Long*, 508 F.3d at 576 ("Even if Deputy Slaton's decision to fire his weapon was not the best available means of preventing Long's escape and preventing potential harm to others, we conclude that Slaton's use of deadly force was not an unreasonable means of doing so."); *see generally Plakas v. Drinski*, 19 F.3d 1143, 1148 (7th Cir. 1994) ("There is no

precedent in this Circuit (or any other) which says that the Constitution requires law enforcement officers to use all feasible alternatives to avoid a situation where deadly force can justifiably be used. There are, however, cases which support the assertion that, where deadly force is otherwise justified under the Constitution, there is no constitutional duty to use non-deadly alternatives first.").

B. Ignoring the serious threat Leija posed (and made) as he approached Officer Ducheneaux, Respondents attempt to shift the focus to Mullenix's state of mind. But Mullenix's subjective intentions are irrelevant. "[T]he Fourth Amendment regulates conduct rather than thoughts." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011). If "the circumstances, viewed objectively, justify [the challenged] action," that action is "reasonable *whatever* the subjective intent motivating the relevant officials." *Id.* (internal quotation marks omitted).

In all events, Respondents' attempt to paint Mullenix as a "renegade" officer fails for at least two reasons. Br. in Opp. 25. First, Respondents embrace the court of appeals' erroneous statement that no other officer agreed with Mullenix's conduct. *Id.* at 10. Respondents ignore the undisputed fact that Officer Rodriguez—the person following Leija and therefore most familiar with the situation—responded "10-4" when Mullenix proposed shooting at Leija's engine. Pet. App. 4a; *see also* Pet. App. 87a n.2 (King, J., dissenting) (noting that "Mullenix discussed his plan to

shoot at Leija's vehicle with two other officers involved in the pursuit—Rodriguez and Shipman—neither of whom made any effort to dissuade him").

Second, Respondents tout the DPS Office of the Inspector General (OIG) report as an official condemnation of Mullenix's action, but that is not the case. The court of appeals recognized (and Respondents ignore) that the OIG report "was subsequently called into question by its author, who testified that he did not have full information on the incident or investigation when he wrote the report." Pet. App. 6a. In fact, once the author had full information, he concluded that Mullenix's use of force was justified. CA5 Record 943. The court of appeals did not rely on the OIG report, and it found no indication that the district court did so. Pet. App. 24a n.3. Respondents also fail to mention that separate investigations by the Texas Rangers and the DPS Firearms Discharge Review board "concluded that Mullenix complied with DPS policy and Texas law." Pet. App. 6a.

Respondents' attempt to impugn Officer Mullenix is not only inaccurate but also irrelevant. That he allegedly lacked training or violated department policy, even if true, would not establish a Fourth Amendment violation. *Cf.* Br. in Opp. 3, 10, 24–25; *see City & Cnty. of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1777 (2015) ("Even if an officer acts contrary to her training, that does not itself negate qualified immunity where it would otherwise be warranted."). After all, the controlling question is whether "a reasonable of-

ficer could have believed that his conduct was justified." *Id.* Mullenix's failure to heed Sergeant Byrd's advice to wait for the spikes (assuming that Mullenix heard it, as the Court must in this summary-judgment posture) is also irrelevant. *See Scott*, 550 U.S. at 375 n.1 ("It is irrelevant to our analysis whether Scott had permission to take the precise actions he took.").[2]

II. THE COURT OF APPEALS' HOLDING ON CLEARLY ESTABLISHED LAW SHOULD BE REVERSED.

The court of appeals created a separate circuit split on the second question presented regarding clearly established law. Pet. 33–34. But even if there were no circuit split, its error subjecting Officer Mullenix to a trial would still warrant review.

This Court has frequently reversed—often summarily—in qualified-immunity cases, even in the absence of a circuit split. As the Court explained last month in *Sheehan*, "Because of the importance of qualified immunity to society as a whole, the Court often corrects lower courts when they wrongly subject individual officers to liability." 135 S. Ct. at 1774 n.3 (internal citation and quotation marks omitted) (citing *Carroll v. Carman*, 135 S. Ct. 348 (2014) (per curiam); *Wood v. Moss*, 134 S. Ct. 2056 (2014); *Plumhoff*, 134 S. Ct. 2012; *Stanton v. Sims*, 134 S. Ct. 3 (2013)

---

[2] Undisputed testimony from multiple witnesses, including Sergeant Byrd, establishes that Mullenix, as the "officer on the scene," was responsible for the decision whether to use force. Pet. App. 83a n.1 (King, J., dissenting).

(per curiam); *Reichle v. Howards*, 132 S. Ct. 2088 (2012)).

Indeed, earlier this month, the Court cited *Sheehan* in summarily reversing a qualified-immunity decision, holding that the law was not clearly established "in a way that placed beyond debate the unconstitutionality" of the defendant's actions. *Taylor v. Barkes*, No. 14-939, 2015 WL 2464055, at *2–3 (U.S. June 1, 2015) (per curiam).

Sheehan recognized that "[this Court] ha[s] repeatedly told courts not to define clearly established law at a high level of generality." 135 S. Ct. at 1775–76 (quoting *al-Kidd*, 131 S. Ct. at 2084). Like the Ninth Circuit in *Sheehan*, the court of appeals erred by defining clearly established law at a high level of generality. It held that any reasonable officer would have known Officer Mullenix's conduct was unconstitutional given the clearly established principle that "it is unreasonable for a police officer to use deadly force against a fleeing felon who does not pose a sufficient threat of harm to the officer or others." Pet. App. 22a; *but see Cordova v. Aragon*, 569 F.3d 1183, 1193 (10th Cir. 2009) (noting that this general principle "begs the question of what constitutes a *sufficient* threat"). Yet as in *Sheehan*, no precedent clearly established that the threat Leija presented—based on his explicit threat to shoot police officers and his imminent arrival at Officer Ducheneaux's position during a high-speed car chase—was not sufficient to justify Mullenix's attempt to stop Leija's car. The generic principle that deadly force is unreasonable absent "a sufficient

threat of harm" did not provide fair notice that Officer Mullenix's conduct violated the Constitution, let alone "place[] the constitutional question beyond debate." *Reichle*, 132 S. Ct. at 2093; *see Taylor*, 2015 WL 2464055, at *2; *cf. Sheehan*, 135 S. Ct. at 1776 ("Qualified immunity is no immunity at all if 'clearly established' law can simply be defined as the right to be free from unreasonable searches and seizures.").

Not once in their discussion of clearly established law do Respondents acknowledge Leija's explicit threat to shoot police. *See* Br. in Opp. 22–23. And they fail to cite a single case in which a fleeing suspect expressly threatened to shoot police.[3] That is enough to prove that Officer Mullenix did not violate clearly established law.

III. THIS IS AN IDEAL VEHICLE.

Respondents identify no vehicle problems preventing this Court from resolving either question presented.

---

[3] The only cited case that involves a threat to shoot officers provides an instructive contrast. In *O'Bert v. Vargo*, 331 F.3d 29, 33 (2d Cir. 2003), a non-fleeing suspect yelled, "I will blow your f***ing heads off," when officers threatened to enter his trailer. The officers saw through a window, however, that the suspect had "nothing in his hands but a cigarette." *Id.* The Second Circuit affirmed the denial of summary judgment because the record, with all disputed facts resolved in the plaintiff's favor, indicated that the suspect did not have a gun when the officers entered the trailer, and he remained in sight until he was shot. *See id.* at 39.

Indeed, this case is an ideal vehicle to consider the Fourth Amendment question in particular. There is no dispute that Leija made explicit threats to shoot police officers, that Officer Ducheneaux was positioned beside the road in Leija's path, or that Leija was closing in on Ducheneaux at the time Mullenix fired his weapon.

The court of appeals did not, as Respondents allege, "conclude that there were triable issues of fact precluding summary judgment." Br. in Opp. i. On the contrary, it held that the facts, viewed in Respondents' favor, "establish that Mullenix's use of force at the time of the shooting was objectively unreasonable under the Fourth Amendment." Pet. App. 21a. The summary-judgment posture therefore will not interfere with review of the Fourth Amendment question.

The legal questions are clearly framed and well-vetted. The court of appeals issued its initial published opinion over Judge King's dissent. It then denied rehearing en banc and issued a substitute opinion, with Judge Jolly and Judge King publishing dissents from the denial of en banc review.

This basic fact pattern—an attempt to stop a fleeing suspect who has expressly threatened to harm police officers—is likely to recur. This exceptionally important issue warrants the Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

CHARLES E. ROY
First Assistant Attorney General

KAREN D. MATLOCK
Division Chief,
Law Enforcement Defense

SCOTT A. KELLER
Solicitor General
Counsel of Record

MATTHEW H. FREDERICK
Deputy Solicitor General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
scott.keller@
texasattorneygeneral.gov
(512) 936-1700

June 2015